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IN THE

Supreme Court of the United States

No. 537

HENDRY CORPORATION,

Petitioner,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STANLEY W. ROSENKRANZ
CHARLES W. PITTMAN of
MACFARLANE, FERGUSON,
ALLISON & KELLY
P. O. Box 1531
Tampa, Florida 33601

Attorneys for Petitioner

FREE PRESS PUB. CO., INC. - TAMPA

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this cause.

DECISION TO BE REVIEWED

Petitioner seeks review of the decision rendered in *United States Fidelity and Guaranty Company v. Hendry Corporation,* 391 F.2d 13 (5th Cir. 1968) (R 117-145; Appendix I).

The decision of the United States District Court for the Northern District of Florida is reported, *United States v. Smith Engineering and Constr. Co.,* 240 F.Supp. 189 (N.D. Fla. 1965). (R 103-109; Appendix II).

JURISDICTION

Jurisdiction is based on Title 28 USC, Section 1254(1); c. 646, 62 Stat. 928.

The decision sought to be reviewed was entered February 29, 1968 (R-117-145; Appendix 1).

Petition for rehearing was denied by order dated June 20, 1968 (R. 147). No extensions of time have been granted within which to petition for certiorari.

Petitioner submits that the decision sought to be reviewed is in conflict with *Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc.*, 92 F.2d 657 (3d Cir. 1937), and with *United States for Use and Benefit of Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705 (2d Cir. 1966).

Petitioner further submits that the decision sought to be reviewed presents important questions under the Miller Act (40 USC, Section 270b) which affect the state-federal judicial relationship concerning the credit to be accorded state judgments in the federal courts (28 USC, Section 1738).

QUESTION PRESENTED

IN AN ACTION BY A SUBCONTRACTOR AGAINST THE CONTRACTOR'S SURETY ON A "MILLER ACT" BOND, IS A STATE COURT JUDGMENT AGAINST THE CONTRACTOR CONCLUSIVE EVIDENCE OF THE AMOUNT OWED THE SUBCONTRACTOR WHERE THE SURETY KNEW OF THE STATE COURT ACTION AND HAD AN OPPORTUNITY TO DEFEND AND THERE WAS NO FRAUD OR COLLUSION?

STATUTES INVOLVED

Section 270b(b) of Title 40, U.S.C. ("Miller Act") provides:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. Aug. 24, 1935, c. 642, § 2, 49 Stat. 794."

Section 1738 of Title 28, U.S.C. provides:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Ter-

ritories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

STATEMENT OF THE CASE

Hendry Corporation (Hendry) sued United States Fidelity and Guaranty Company (USF&G) in the United States District Court for the Northern District of Florida (R 1-5). The complaint charged that USF&G was indebted to Hendry on a "Miller Act" bond for materials furnished and work performed by Hendry for USF&G's principal, Smith Engineering and Construction Company (Smith).

Various pleadings, motions and affidavits were filed and some preliminary issues were resolved by the District Court. The cause ultimately came on for hearing on Hendry's motion for summary judgment. The District Court stated the posture of the case and the question involved here as follows:

"The use plaintiff Hendry moves for summary judgment seeking to recover from defendants under the provisions of the Miller Act for labor and materials supplied to Smith Engineering and Construction Company pursuant to a written contract. The contractual relationship and obligations arising thereunder between Hendry and Smith have been determined in a chancery proceeding in the Circuit Court of Escambia County, Florida. A certified true copy of the final decree entered by the State Court on July 13, 1964 is incorporated by reference and

made a part of the pleadings. United States Fidelity and Guaranty Corporation was not a party to the state litigation.

"The following questions are raised:

Is the decision of the state case conclusive evidence as to the amount actually owed to plaintiff?" 240 F.Supp. at 190; R 103-04.

The District Court recited these facts:

"United States Fidelity and Guaranty Corporation contends that the state case was not binding upon it since it was not joined in that proceeding. It does not, however, deny having knowledge of the state case. As a matter of fact, *the attorney for Smith in the state was also the attorney of record for United States Fidelity and Guaranty Corporation at that time.*" (Emphasis added.) 240 F.Supp. at 190; R 104.

The District Court held that the amount of the state court judgment against USF&G's principal was binding on USF&G.

USF&G appealed the summary judgment to the Court of Appeals for the Fifth Circuit which reversed the judgment of the District Court, Judge Godbold dissenting, *United States Fidelity and Guaranty Company v. Hendry Corporation,* 391 F.2d 13 (5th Cir. 1968) (Appendix I; R 117-145).

The Court of Appeals held that in a "Miller Act" case the amount of the surety's liability must be determined in a trial on the merits in the United States District Court.

Petitioner, Hendry Corporation, seeks review of that decision.

ARGUMENT

A SURETY ON A "MILLER ACT" BOND IS BOUND, ABSENT FRAUD AND COLLUSION, BY A STATE COURT JUDGMENT AGAINST THE SURETY'S PRINCIPAL WHERE THE SURETY HAD KNOWLEDGE OF AND AN OPPORTUNITY TO DEFEND THE STATE COURT ACTION.

The majority of the Court of Appeals recognized the principle of law that a surety is bound by a judgment against the surety's principal:

> "The usual law of suretyship on which the appellee relies is concisely stated in *Lake County v. Massachusetts Bonding & Ins. Co.*, 5 Cir. 1935, 75 F.2d 6, 8:
>
> > 'Where it appears that the judgment against the defendant was obtained in a suit of which it had full knowledge, and which it had full opportunity to defend, the judgment therein is not only evidence, but conclusive evidence, against every defense except that of fraud and collusion in obtaining it. . . . Where it is not made to appear that the surety knew of and had opportunity to defend the suit, then the judgment is prima facie evidence that the surety is liable, sufficient to support a verdict unless it is rebutted by proof on the part of the surety that it was obtained through fraud or collusion, or that the loss or liability created by the judgment arose from acts other than those indemnified against under the conditions of the bond.' " R 124.

The record supports Judge Godbold's statement of the factual context:

"Fidelity & Guaranty had knowledge of the suit against its principal and an opportunity to defend it. Both the state court proceeding against the principal and the federal suit on the bond took place in Pensacola, Florida. The same attorneys represented the principal in state court and the surety in federal court. Though the state suit was filed long before the federal suit it lay dormant, and in the active stages of litigation the two cases proceeded more or less concurrently." R 138

Undoubtedly under general suretyship law and Florida law the state court judgment against Smith would be conclusive evidence of the amount owed Hendry in an action against USF&G on its bond.

The Court of Appeals held that this principle of evidence and of suretyship law was inapposite in an action on a Miller Act bond because of the proviso in Title 28 USC, Section 270b(b) that "Every suit * * * shall be brought * * * in the United States District Court * * *." The Court of Appeals has held that this proviso was a jurisdictional limitation and that Congress has created a unique species of suretyship law to which the usual principles of suretyship law and evidence are inapposite. This decision collides with *Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc.*, 92 F.2d 657 (3d Cir. 1937).

The *Massachusetts Bonding* case was based on the Heard Act, 33 Stat. 811, 812, which was the predecessor of the Miller Act. The subcontractor obtained judgment against the surety's principal in the state court and then sued the surety on the bond in the federal court (the same situation exists in the case at bar). The Court of Appeals for the Third Circuit said:

"In general, a judgment against the principal is prima facie evidence against the surety, and if the surety participates in the action against his principal, he is concluded as to the issues therein decided against his principal. . . .

"The Heard Act gives those who have furnished labor and material used in the construction of any public work and who have not been paid therefor . . . the right to institute suit against the contractor and sureties in the name of the United States to their use, . . . and, 'where suit is so instituted by a creditor . . . only one action shall be brought.' This provision refers only to an action brought 'on the bond' and not to some other suit not based on the bond directly. The suit in the state court was not brought on the bond. . . . and so the Heard Act does not apply to that suit." 92 F.2d at 658-59.

The surety was held bound by the state court judgment.

Petitioner submits that the *Massachusetts Bonding* case cannot be distinguished from the case at bar. Of course the wording of the Acts is different; the Heard Act allowed only one action and the Miller Act allows suit only in the District Court where the contract is performed. But the purpose of each is the same—to give some protection to Miller Act defendants. (R 127). Moreover a complete answer to the "jurisdictional" and venue proviso of the Miller Act is that *Hendry sued USF&G* in the District Court for the district where the contract was performed.

The venue proviso of the Miller Act does not purport to change rules of evidence, or perhaps to be more technical, to change a principle of suretyship law which provides for substituted evidence. As Judge Godbold said:

"I dissent from the conclusion of the majority. It is inconsistent with all previous Miller Act case law I am able to find on the subject. * * *

"The usual rule referred to above has long been applied in Miller Act and Heard Act cases without regard to whether the judgment against the principal was obtained in state or federal court. *Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc.*, 92 F.2d 657 (3d Cir. 1937) (state court judgment); *United States ex rel. Larkin v. Maryland Casualty Co.*, 45 F.Supp. 286 (D. Mass. 1942) (state court judgment); *Herzog v. DesLauriers Steel Mould Co.*, 46 F.Supp. 211 (E.D. Pa. 1942) (federal court judgment). Compare *United States ex rel. Vigilanti v. Pfieffer-Neumeyer Constr. Corp.*, 25 F.Supp. 403 (E.D.N.Y. 1938)." R 138-39

The case at bar presents an important question under the Miller Act that should be passed upon by this Court, even if the *Massachusetts Bonding* case is not deemed in conflict because it is based on the Heard Act.[1] It is not uncommon for a public works contractor to sue a subcontractor or materialman in a state court for faulty workmanship or failure to deliver on schedule. Such claims produce counterclaims for payment. If the contractor prevails, the surety is entitled to raise the state court judgment as a bar under the doctrine of res judicata.[2] But if the subcontractor prevails in the state court action, must he prove his case a second time in the federal court before he gets paid? Suppose the contractor sued in the federal court on diversity of citizenship, would the federal court give credit to its own

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[1] See concurring opinion of Mr. Chief Justice Warren in *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167, 83 S.Ct. 1815, 10 L.Ed. 2d 818 (1963), which declined to decide whether an arbitration provision in a Miller Act bond is enforceable.

[2] *Prichard v. Nelson*, 137 F.2d 312 (4th Cir. 1943).

judgment? These questions should be answered by this Court if the Miller Act is to have the liberal, remedial effect that was intended.[3]

Petitioner also submits that the appellate decision in the case at bar is completely at variance with the approach of the Court of Appeals for the Second Circuit in *United States for Use and Benefit of Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705 (2d Cir. 1966), cert. dismissed 385 U.S. 924. The Second Circuit held that a subcontractor could not sue under the Miller Act until he had complied with the arbitration provision of his subcontract.[4] The Second Circuit held that the Federal Arbitration Act[5] applies to suits under the Miller Act.[6] In other words the Second Circuit says the Miller Act has not exempted operation of local and federal arbitration acts. Indeed, the arbitration agreement was enforced under *state* law. In the case at bar, the Fifth Circuit has held the Miller Act exempted operation of Title 28 USC, Section 1738, which requires federal courts to give full faith and credit to state court judgments.[7] It seems inconsistent to exempt the operation of a statute that has Constitutional[8] underpinnings and apply a local arbitration statute.

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[3] *Barrett-Moore & Associates v. U. S. for Use of Harwell*, 367 F.2d 122 (10th Cir. 1966).

[4] The Seventh Circuit has held likewise, *U. S. for Use and Benefit of Frank A. Trucco & Sons Co. v. Bergman Const. Corp.*, 256 F.2d 851 (7th Cir. 1958).

[5] Title 9, USC.

[6] See also *U. S. for Use and Benefit of Industrial Engineering & Metal Fabricators, Inc. v. Eric Elevator Corp.*, 214 F.Supp. 947 (D. Mass. 1963), and *U. S. for Use and Benefit of Ray Gains, Inc. v. Essential Const. Co.*, 261 F.Supp. 715 (D.Md. 1966).

[7] *Williams v. Murdock*, 330 F.2d 745 (3d Cir. 1964).

[8] Article IV, Section 1.

The Fifth Circuit refused to give credit to the state court judgment because "The only function remaining for the federal district court would be to rubber-stamp the state judgment * * *." (R 126). Can there be any doubt that a federal court would rubber-stamp an arbitration award absent corruption or fraud, the same test that applies to suretyship cases? See Title 9 USC, Sections 10 & 11.

The principle that petitioner seeks to apply here is a rule of evidence, or a rule permitting substituted evidence, so that issues between parties or their privies will not be re-litigated. Section 1738 articulates the public policy that matters should not be re-litigated.[9]

The Second Circuit says an arbitrator may decide the issues but the Fifth Circuit says that a state court of competent jurisdiction may not decide the issues. There is a clash in approach to Miller Act problems.

The *Capolino* case raises another important federal question. The Second Circuit said:

> "Second, when our court last considered in detail the history and purpose of Section 2(b) of the Miller Act we concluded that the provision requiring Miller Act plaintiffs to bring suit in a United States district court for a district in which the contract was to be performed and not elsewhere was now of 'scant utility, save as a convenience to the defendants.' * * * We continue to believe this is a correct statement of that section's purpose. That case did not require us to decide whether Section 2(b) contained a venue requirement or a jurisdic-

[9] *Wayside Transp. Co. v. Marcell's Motor Exp., Inc.*, 248 F.2d 868 (1st Cir. 1960).

tional limitation. * * * But other courts that have decided this issue have, almost without exception, held that Section 2(b) is a venue requirement, and have agreed with us that its purpose is to give some incidental protection to Miller Act defendants. * * * It is thus quite settled that Section 2(b) of the Miller Act requiring Miller Act plaintiffs to sue in a federal district court for a district in which the contract was to be performed and not elsewhere *is a venue provision* benefiting defendants in some cases." (Citations omitted. Emphasis added.) 364 F.2d at 707.

The Fifth Circuit has held that the proviso is jurisdictional: "Congress vested exclusive jurisdiction over Miller Act suits in federal courts"; "The judgment of the district court is REVERSED, and the case is REMANDED to that court for a trial on the merits." (R 127, 137).

The exemption of the Miller Act from the operation of Section 1738 and the effect of the venue proviso in the Miller Act present important federal questions that have not been passed upon by this Court.

CONCLUSION

The Court should grant certiorari and hear the cause on the merits.

Respectfully submitted,

STANLEY W. ROSENKRANZ

CHARLES W. PITTMAN of
MACFARLANE, FERGUSON,
ALLISON & KELLY
P. O. Box 1531
Tampa, Florida 33601

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that copy hereof has been furnished to each of the following by mail:

BERT LANE, ESQ.
BEGGS, LANE, DANIEL, GAINES & DAVIS
Attorneys at Law
Post Office Box 1351
Pensacola, Florida

RICHARD H. MERRITT, ESQ.
Attorney at Law
Lawyers' Building
Pensacola, Florida

Smith Engineering & Construction Company
Post Office Drawer 1831
Pensacola, Florida

Done this _____ day of September, 1968.

_____
CHARLES W. PITTMAN